STATE OF MICHIGAN

COURT OF APPEALS

NANCY JACQMAIN,

Plaintiff-Appellant,

v

MERLU CORPORATION, d/b/a JONES NEW YORK STORES, CINDY ROBINSON, and LAURIE EVERETT,

Defendants-Appellees.

UNPUBLISHED
May 6, 2003

No. 234610
Saginaw Circuit Court
LC No. 99-026560-NZ

Before: Donofrio, P.J., and Saad and Owens, JJ.

SAAD, J. *(concurring in part and dissenting in part).*

I concur with the majority on the contract issues and would remand for further proceedings consistent with the majority's opinion.

However, I respectfully disagree with the majority's reversal of the jury's no cause determination regarding plaintiff's age discrimination claim. The majority reverses the jury verdict because of defense counsel's reference, during closing argument, to a juror who had been dismissed for sleeping. As a threshold matter, I do not think the comments constituted error. See *Kubisz v Cadillac Gage Textron, Inc*, 236 Mich App 629, 638; 601 NW2d 160 (1999), quoting *Hunt v Freeman*, 217 Mich App 92, 95; 550 NW2d 817 (1996). Defense counsel's remarks were within the bounds of proper argument and did not unfairly suggest that the jury decide the case for self-interested reasons.

The majority's reliance on *Duke v American Olean Tile Co*, 155 Mich App 555, 564; 400 NW2d 677 (1986) is misplaced because it is clearly distinguishable from this case. In *Duke*, the attorney explicitly argued that if the jury returned a verdict in favor of the defendant, the jurors themselves or the jurors' family members might be injured by the defendant's product. *Id*. at 563-564. Indeed, the attorney appealed to specific jurors *by name* and asserted that each might slip and fall on defendant's "unreasonably dangerous" floor tile and thus, suffer a similar fate as the plaintiff. *Id*. In that case, this Court correctly ruled that the attorney acted improperly "by suggesting what the consequences of the verdict would mean to [the jurors] personally . . . ." *Id*. at 564. Here, the attorney did not suggest what the consequences of the verdict would mean to the jurors personally. Further, counsel's analogy to an inattentive juror *who was removed from the jury* is simply not the same as an attempt to persuade jurors that they will put themselves and their loved ones in harm's way unless they impose liability on a defendant. Moreover,

notwithstanding the improper argument in *Duke*, this Court reversed the jury's verdict only when considering the argument in conjunction with several other, highly inflammatory remarks by the attorney. *Id*.

The majority's reliance on *Clark v Grand Trunk WR Co*, 367 Mich 396, 400; 116 NW2d 914 (1962), is also inapposite. In *Clark*, the jury returned a verdict for the defendant railroad company in an action for damages after the plaintiff was brutally assaulted and robbed in a train depot. *Id*. at 397. Our Supreme Court granted a new trial, in part, because the defense attorney, implying that local train stations might close if the railroad had to pay out a judgment, asked the jurors to consider the personal impact of a verdict in favor of the plaintiff. *Id*. at 398, 402. Specifically, the railroad attorney asked the jurors to contemplate "[w]hat effect would a decision for the plaintiff in this case have upon business and upon you as individuals, as owners of businesses, as farmers, as owners of property." *Id*. at 398. As in *Duke*, the *Clark* attorney made a direct appeal to the jurors' self-interest by asking them to decide the case based on how the verdict would impact them personally. Unlike *Duke* and *Clark*, attorneys often rely on analogies about familiar situations in order to better illustrate their view of the evidence. This is certainly the case here and, as discussed, the attorney did not argue that the jury should base its decision on how the verdict would impact them personally. Had counsel cautioned against a verdict in favor of plaintiff because such a verdict would unfavorably impact members of the jury (i.e., higher prices at stores, etc.), then this would have been an improper appeal to the jurors' interests. In my view, there was no error because counsel's argument was not improper.

Furthermore, plaintiff failed to preserve this issue for appeal by failing to request a curative instruction. See *Reetz v Kinsman Marine Transit*, 416 Mich 97, 100-102; 330 NW2d 638 (1982). Notwithstanding plaintiff's failure to ask for an instruction at a time when the trial court could have easily cured any alleged error, the majority would reverse a jury verdict after a lengthy trial involving substantial expense to the parties and the court. I think this is a particularly harsh result because (1) the comments were proper; (2) no curative instruction was requested, and (3) the trial court clearly advised the jury that the arguments of counsel are not evidence.

Moreover, were I to conclude that counsel's remarks about the sleeping juror could be read as erroneous, I would conclude that any error is harmless. Counsel made reference to the dismissed juror simply as one of several illustrations to make the point that if someone does not do his or her job or show up for work, others are inevitably impacted. This was not a calculated attempt to persuade the jurors that they had an interest in ruling against plaintiff; it was simply an attempt to illustrate that one person's conduct impacts others.

Because the comment was not improper, because this issue was not preserved for appeal and because the comment, were it improper, is clearly harmless, I would affirm the jury's verdict on plaintiff's age discrimination claim.

/s/ Henry William Saad